U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16226054

Date: JUL. 14, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits additional documentation and a brief asserting that he is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

At initial filing, the Petitioner provided documentation labeled, "Advanced Degree." In his initial cover letter, the Petitioner claimed eligibility for classification as an individual of exceptional ability and discussed the applicable regulatory criteria. The Director's decision, however, does not reflect that he made a determination whether the Petitioner qualified for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. In addition, the decision does not provide a proper analysis of the documentation or a sufficient discussion explaining the Petitioner's eligibility for a national interest waiver under the *Dhanasar* analytical framework.

A. Member of the Professions Holding an Advanced Degree

In order to qualify as a member of the professions, an individual must meet "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. 204.5(k)(2).[4] Further, in order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] Section 101(a)(32) of the Act states "[t]he term 'profession' shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director's decision does not determine whether the Petitioner's occupation, "an entrepreneur within the field of gastronomy, culture, and economic development in the food industry generally,"[5] qualifies as a member of the professions. In addition, the Director does not conclude whether the Petitioner's "DIPLOMA" (1992) as a "PUBLICITY TECHNICIAN" from the [redacted] Business School qualifies as either a foreign equivalent degree above that of baccalaureate or as a foreign equivalent of a baccalaureate degree followed by at least five years of progressive experience in the specialty. As such, the Director did not decide whether the Petitioner is a member of the professions holding an advanced degree.

B. Exceptional Ability

The Petitioner asserted eligibility and submitted documentation for five of the regulatory criteria under 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F).[6] He also claimed comparable evidence under 8 C.F.R. § 204.5(k)(3)(iii).

The Director's decision, however, does not address whether the Petitioner satisfied at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) or has provided sufficient comparable evidence, and has achieved the level of expertise required for exceptional ability classification. Accordingly, the Director did not determine whether the Petitioner established eligibility as an individual of exceptional ability.

C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

1. Substantial Merit and National Importance of the Proposed Endeavor

The Director lists documentation and states that the evidence does "not support that the proposed endeavor has substantial merit," and "the petitioner has not established that the proposed endeavor is of national importance." The decision, however, does contain a proper analysis of the documentation or a sufficient discussion explaining why the Petitioner does not meet this prong of the *Dhanasar* framework.

[5] *See* the Petitioner's "Professional Plan & Statement" submitted in response to the Director's request for evidence.
[6] The Petitioner did not claim eligibility for the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C).

2. Well Positioned to Advance the Proposed Endeavor

Relating to *Dhanasar*'s second prong, the Director indicated that the Petitioner "has proven he has years of experience as an entrepreneur and provided sufficient evidence to show that [he] is well positioned to advance the proposed endeavor." However, the decision does not identify the evidence and sufficiently explain how this determination was based.

3. Balancing Factors to Determine Waiver's Benefit to the United States

With respect to prong three of the *Dhanasar* precedent decision, the Director's decision states that "[t]he petitioner has submitted sufficient evidence to show that he has had some success in the entrepreneurship," but "the petitioner has not submitted evidence that it would be impractical for that business to seek the labor certification process, that the proposed endeavor is so urgent to waive the labor certification process, or that the endeavor would be beneficial to the United States." The Director's decision does not show that it addressed the Petitioner's arguments and evidence submitted at time of initial filing and in response to the RFE and notice of intent to deny. Without a proper evaluation of the evidence in accordance with the factors identified in the *Dhanasar* precedent decision, the Director's determination regarding prong three was in error.

III. CONCLUSION

To meet the requirements for a national interest waiver, an individual must first qualify for the underlying EB-2 visa classification. We are therefore remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. In addition, the Director should properly apply all three prongs of the *Dhanasar* analytical framework to make a determination as to whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. As such, we will remand the matter for further consideration of the record, including claims and documentation submitted on appeal, and entry of a new decision.[7]

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.

[7] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. 1 *USCIS Policy Manual* F, https://www.uscis.gov/policymanual. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. *Id.*